Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States
October Term, 1997

Ray Watson,
Petitioner,

v.

William Szczepaniak, Las Vegas Valley
Water District
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for a Writ of Certiorari

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64 pp

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Questions Presented

In its June 29, 1995 (A11), the trial court dismissed petitioners' original complaint, but him gave leave to amend to ***"correct noted deficiencies, if he can"***. Further, the court said ***"As the amended complaint will supercede the original complaint, the amended complaint must be complete within itself, that is, it may not refer to the original complaint."*** Petitioner filed his amended complaint on July 25,1995, but the court did not rule on his complaint until March 25, 1996; ***eight months later***. During that time frame and pursuant to FRCP 3, there was no complaint before the court to: (1)***"commence" an*** action, (2) set forth any claims or, (3) set grounds for jurisdiction. Without a ruling by the court, it was impossible to know whether or not petitioner had corrected ***"noted deficiencies" mandated*** by the trial court. Still the trial court proceeded with litigation including discovery, hearings and even sanctioned petitioner **$3,184.01** for allegedly ***"failing to attend his deposition"***. However, at a more appropriate time a few weeks later, petitioner did attend his deposition.

In addition, while local rule 190-(1)((2) required that scheduling order be issued prior to the commencement of discovery, the court did not comply with this rule. Without supplying foundation, the appellate court rejected petitioners' argument holding that the courts' refusal to ***"issue a scheduling order was inapposite"*** (A3, par. 4). Conversely, on the previous paragraph, when petitioner was accused of a rules infraction, the rules were not ***"inapposite"***. The memo simply stated; ***"Watson failed to comply with the courts' local rules"*** (LR 140-3). Finally, since only the complaint can set forth the claims for relief and the grounds upon which the courts' jurisdiction rests, the questions are;

1.

Did the trial court; (a) have jurisdiction to conduct eight months of proceedings without a complaint at issue, (b) deny petitioner a fair adjudication of his case on its merits, (c) violate petitioners' due process right to ***"the usual and accepted course of judicial proceedings"***, (d) abuse its discretion?

2.

In light of the Civil Justice Reform Act of 1990(A30, par. 1), did the trial courts' conduct depart from the intent of the act, as well as the commitment it made to the Judicial Conference of the United States.

3.

Without a complaint at issue pursuant to FRCP 3 can the court (a) Deprive petitioner of his property using supposition (b) Sanction petitioner $3,184.01 for *allegedly* failing to attend his deposition?

4.

In Ghazali v. Moran, 46 F 3d. 52 (9th Cir. 1995) the court held, *"failure to follow a district court local rule is proper ground for dismissal"*. Since LR 100-3 requires that the court give **notice** and an opportunity to respond prior to the imposition of sanctions, can the trial court deprive petitioner of his property ($3,184.01) without complying with this rule?

5.

If petitioner was unable to attend a deposition on a particular day, but did attend at a later date, (a) are sanctions inappropriate and (b) was this sanction arbitrary and abuse of discretion

6.

In Johnson v. Mammoth Inc., 975 F.2d 604 (9th Cir. 1992) the court held; *"A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril. Gestetner Corp., 108 F.R.D. at 141"*. Even though Local rule 190-1 required a scheduling order be issued, the appellate court merely said that the trial court's ignoring the rule was **"inapposite"**(A3, par.4). Does non-compliance with the rule constitute, (a) departure from accepted and usual course of judicial proceedings, and (2) denial petitioner' procedure due process rights?

7.

Petitioner was **Re-instated** (page A30, par 3) to employment by the respondents on **February 25, 1993**, given a notice of intent to terminate by supervisor William Szczepaniak on **March 4, 1993** and was terminated by Szczepaniak on **March 31, 1993.** Thus, **March 4, 1993** was the correct date (*harm*) for determining the statute of limitations according to Bagley.v. CMC Real

Estate Corp., 923 F2d 758, 760 (9th Cir. 1991), cert. Denied 112 S Ct 1161 (1992). The trial held that *"claims after February 24, 1993 were not barred by the statute of limitations."* Since the trial court did not hold that petitioner was barred (A 11), while the appellate simply stated, without any conclusions of law, petitioner was barred, did the appellate court (a) violate petitioners' due process rights in light of Daniels v. Williams, 88 L Ed 2d 662, 672, 673 and, (b) conflict with Bagley and Daniels ?

8.

Does petitioner have a constitutional right to have the courts support their decisions by, (a) a statement of the issues (2) a statement of the facts, (3) the underlying reasons and (3) the legal foundation upon which it rests ?

9.

Did the courts depart from controlling law regarding the correct accrual date of petitioners' claims and, if so, does this create an issue of fact and law sufficient to defeat the affirmation of summary judgment ?

10.

In Ahmad v. Southwest Gas, 668 P.2d 261 (Nev), the Nevada Supreme Court held that the employee handbook created a contract of employment and the employer is bound by those provisions. The Management work rule 4.6.1 (A26) specifies that only a department or division head can remove and employee.(**a**) Did **supervisor** William Szczepaniak have authority to terminate petitioner pursuant to the employment contract, (**b**) Did the trial and appellate courts violate petitioners' constitutional right to due process by failing to address this issue, (**c**) Did this create a genuine issue of material fact sufficient to defeat a motion for summary judgement pursuant to Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986) (**d**) Did the trial and appellate courts decide an issue which conflicts with a state court of last resort ?

11.

In Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990), the court held; "[the] court abuses its discretion when it based its decision on an erroneous view of the law or a clearly erroneous *assessment of the facts."* Did the appellate court violate petitioners constitutional right to due process by admittedly basing its affirmation on the district court *"records" and* failing to address the issues in petitioners' Appeal opening brief?

12.

Did the appellate court violate petitioners' substantive due process by failing to maintain conformity with Ninth Circuit controlling case law contained in petitioners opening brief and his Petition for Rehearing?

13.

Did the courts violate petitioners' constitutional right to due process and a fair trial and abuse its discretion by affirming a protective order for material witnesses critical to petitioners' case?

14.

Does granting a protective order to these vital witnesses (a) constitute a *"functional equivalent"* of a grant of immunity to which these witnesses are not constitutionally entitled and, (b) an abuse of discretion in light of in light of Clinton v. Jones 117 S. Ct. 1636 (1997) ?

15.

Did the dismissal of Hearing Officer David Donnelly as a defendant, while ignoring FRCP 15(c) and controlling case law regarding this issue, (a) constitute a departure from the accepted and usual course of judicial proceedings (b) create a conflict within Ninth Circuit cases, and (c) is this also an abuse of **discretion**?

16.

The trial court denied petitioner the right to amend his complaint stating he did not file points and authorities. Petitioner cited the Federal District Court of Nevada as an authority as well as submitting *"Additional Points and Authorities"* a few days afterwards. (a) Is the District Court of Nevada an authority just as other circuit courts founded by legislative authority and, (b) Is this alleged *"misstep"* by a pro se litigant sufficient or weighty enough to deny his constitutional right to a hearing on the merits.

17.

A month after his post-termination hearing, petitioner was informed in a decision letter by Hearing Officer David Donnelly that evidence and a witness used against him was withheld during the termination hearings. The appellate court held that petitioner did not show that his *"inability to cross-examine the author of the letter, affected his opportunity to be heard at a meaningful time*

and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 335 (1976)". (**a**) How is it possible that petitioner was given an opportunity to be heard in a *"meaningful time and meaningful manner"* on matters he only learned of a month later? (**b**) Is this appellate decision disingenuous, an abuse of discretion and a flagrant violation of petitioners' due process rights in light of Loudermill v. Cleveland Board of Education, 470 US 532,(1985)? (c) The courts failed to construe petitioners' complaint in a favorable light in direct contrast to Yamaguchi and other controlling case law. Does this depart from *the usual and accepted course of judicial procedures* and violate petitioners' due process rights to a fair trial and fair procedure?

18.

In light of the many genuine issues remaining for trial, was the granting of summary judgment an abuse of discretion ? In light of Haines v. Kerner, 404 US 519 (1972) was petitioner, a pro se litigant, denied a trial on the merits of his case ?

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List of Parties

1. Las Vegas Valley Water District, Respondent
2. William Szczepaniak, Supervisor, Respondent
3. Ray Watson, Petitioner

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Jurisdiction

The date the Ninth Circuit court of Appeals decided my case was September 12, 1997. A timely petition or rehearing was denied by the United States Court of Appeals on January 16, 1998 and a copy of the order denying rehearing appears at A18.

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Constitutional and Statutory Provisions Involved

The constitutional provisions of the Fourteenth Amendment provides; *"No state shall make or enforce any law which shall abridge the privileges or immunizes of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law."*

The statutory provision, 42 USC § 1983 provides; *"every persons who, under the color of any statute, ordinance, regulation, custom, or usage, of any state or territory ..... subject, or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."*

Statement of the Case

A.
Departure from Accepted Judicial Procedures

Petitioner filed his original complaint on February 24, 1995 and all counts were dismissed with leave to amend certain deficiencies. The Trial court stated petitioner must ***"correct noted deficiencies, if he can"*** (A17, Trial Court order # 8). Petitioner filed his amended complaint on July 25, 1995, but the district judge did not rule on the amended complaint until March 25, 1996.

During those eight months before the trial judge ruled, the court radically departed from the *"accepted and usual course of judicial proceedings"*. With reckless disregard for FRCP 3, the court proceeded with discovery without a ruling on petitioners' amended complaint. A complaint is necessary to **(1)** commence the action, **(2)** establish the claims for relief and, **(3)** provide a statement of the grounds upon which the courts' jurisdiction rests. Accordingly,

"a court does not have the power by judicial fiat to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. An erroneous affirmative conclusion as to jurisdiction does not act in any proper sense to enlarge the jurisdiction of the court, until passed upon by the court of last resort. Stoll v Gottlieb, 305 US 165 at 171/172, (1938)". {T}he state. . .can speak and act only .by law, whatever it does say or do must be lawful. That which . is unlawful because made so by the Constitution of the US, is not the word or deed of the state, but is the mere wrong or trespass the individual persons who falsely speak or act in her name. Keith v Clark, 97 US 454 at 465, (1878); Williams v Bruffy, 96 US 176 at 192, (1877); Horn v Lockhart, 17 Wall 570, (1873); Thorington v Smith, 8 Wall 1 at 9, (1868); Texas v White, 7 Wall 700, (1868) as cited in Poindexter v Greenhow, 114 US 270 at 290, (188)"

The trial court conducted furious judicial proceedings, including sanctioning petitioner, with complete indifference to the fact that **there were no legal claims or jurisdiction to proceed.** FRCP 3 clearly states; *"A civil action is commenced by the filing of a complaint."* Equally clear was the unambiguous prerequisite that petitioner must ***"correct noted deficiencies, if he can"***; leaving no doubt that no complaint existed until the court had ruled accordingly. The court will note that even in a traffic court, a ticket (complaint) is indispensable for (1) the jurisdictional authority for commencement of judicial proceedings, (2) the definition of the act complained of and, (3) the fair adjudication of the action.

Petitioner's case was governed local rules for the United States District Court, District of Nevada, made effective February 1, 1992. District court ignored its duty to comply with its own local rules; LR 190-(1)(2) in particular. That rule mandates the issuance of a scheduling order and clearly states:

(1) " Unless otherwise ordered by the court, a judge shall enter a scheduling order as hereinafter provided,

(2) The scheduling order shall be filed and served by the clerk upon counsel for all parties at the time the case

is at issue or 120 days from the date of filing of the complaint, or petition, whichever is earlier."

Here, the trial court did not issue a scheduling order until February 5, 1996 and all discovery proceedings prior to this date were void. Even when the court did issue its order, no jurisdictional authority or claims existed since the trial judge had not ruled on petitioners' amended complaint.

B.

Claims Not Barred by Statute of Limitations

On **January 19, 1993,** petitioner, a public employee, was given a notice of intent to terminate *(harmed)* by his supervisor William Szczepaniak and subsequently ***"terminating his employment as of January 22, 1993"***. (A11, Trial Court Order # 8). Petitioner was given a post-termination hearing with Hearing officer Richard Wimmer on February 11, 1993. Petitioner was **re-instated to employment** by Hearing officer Richard Wimmer on **February 24, 1993**. On **March 4, 1993,** William Szczepaniak *"informed plaintiff that he was proposing to terminate him..."*(A6, Par. 3). According to Ricks"[1], this is the date the *"adverse employment decision"* was communicated to petitioner and the correct accrual date of his harm.

However, in the appellate court's memorandum decision (A2, par. 3), the court held that *"To the extent that Watson's claims of violation of his constitutional rights arise from his termination, the trial court correctly dismissed them as barred by the revelant statute of limitations. (See Wilson v. Garcia, 471 US 261, 276(1985) Nev. Rev. Stat. 11.190(4) (e).*

The appellate court's reference to Wilson in this instance is misplaced. Wilson simply holds *that* in §1983 claims, federal court must apply the states' personal injury statute of limitations; which is two years in Nevada. Here the question is not whether or not Nevada's two-year statute of limitations apply, but rather, when was the accrual date of petitioner's claims. According to

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[1] Delaware State College v. Ricks, 449 US 250, 258. Chardon v. Frenadez, 404 U.S. 250,258, 504 Led.2d. 431(1981).

Bagley v. CMC Real Estate Corp., 923 F2d 758m 760(9th Cir. 1991), cert. Denied. 112 S Ct. 1161(1992). The appeals court should have applied March 4, 1993 as the correct accrual date in determining the statute of limitations. The appellate court merely proffered "sweeping *conclusory*" statements and **failed to address petitioner's opening brief** on this issue. (Petitioner's Opening brief page 6, line 16), or his Petition for Rehearing (Rehearing petition page 22, line 16).

Clearly, controlling Ninth Circuit case law demonstrates that the appellate court departed from the accepted and usual course of judicial proceedings. Petitioner relies on Delaware State College v. Ricks, 449 US 250, 258, which held that "*accrual generally occurs at the time the [adverse employment] decision was made and communicated to the employee*". Even the trial court held that petitioner's claims occurring after February 24, 1993 were not barred by the statute of limitations. (A14, par.1). All petitioner's claims brought before the court, including his wrongful termination, were claims occurring **AFTER FEBRUARY 24, 1993.** On **March 15, 1993**, petitioner received a pre-termination hearing from his supervisor William Szczepaniak and was officially terminated on **March 31, 1993**.

Petitioner received a post-termination hearing from Hearing Officer David Donnelly on **May 13, 1993** and his affirmation of supervisor William Szczepaniak's termination on June 11, 1993. These events, occurring after petitioners' re-instatement on February 24, 1993, constitute a "**new injury**" pursuant to the "**separate accrual rule,** *which provides that a new cause of action accrues for each new and independent injury*", Grimmett v. Siragusa, 96 C.D.O.S. 539. It is indisputable that petitioner's claims regarding his termination and post-termination were not barred by the statute of limitations. This issue was brought on appeal in appellate's opening brief (page 10, line 12) and Petition for Rehearing (page 2, line 20). Without explanation, conclusions of law, or even addressing petitioner's brief, the appellate court erroneously ruled that petitioner's claims were barred by the statute of limitations. Clearly, the courts' erroneous assessment of the facts was an abuse of discretion and violation of petitioners' right to a fair trial.

C.

Fundamental *Rights Were Alleged*

In A2, par. 4, the appellate court's memorandum states: *"Watson did not allege facts implicating the violation of a* fundamental *right and, defendants' decision to terminate him was at least rationally related to a legitimate governmental interest, he failed to make out a claim for violation of his substantive due process rights"*. Fundamental rights are those which have their origin in express terms of the constitution, which are necessarily implied in those terms. Sidle v. Majors, 264 IND. 206, 341 N.E. 2d 763, 769. See e.g. Bill of Rights. The appellate courts' conclusory statement does not apply. In fact, the appellate court conflicts with its own decision in McCalden v. California Library Assn., 955, F2d 1214, 1223-24 (1990). In Mckenny v. Renne, 94-15179 (1996), the Appellate court, quoting same said;

> *"We held in MaCalden that a plaintiff is not required to state statutory or constitutional basis for his claim, only the facts underlying it."*

The appellate court's memorandum disregarded material points of fact in petitioner's amended complaints (#1 & 2) which clearly alleged several fundamental rights made applicable to the states through the 14th Amendment of the constitution. In fact, in petitioner's July 25, 1993 amended complaint, count # 8 an #9. (See opening brief) Petitioner stated in count # 8;

> *"that defendant William Szczepaniak denied plaintiff the* ***right of notice of evidence****, specifically, a letter addressed to defendant Szczepaniak,* dated *March 5, 1993, from the City attorney. Defendant Szczepaniak denied plaintiff the opportunity of response and rebut said evidence at plaintiff's pre-termination hearing on March 15, 1993"*. And count #9 states; ***"That subsequently to the May 13, 1993 post-termination hearing, the evidence letter from the city attorney, addressed to the defendant Szczepaniak, and dated March 5, 1993, was presented to an relied upon by hearing officer David Donnelly.***

Hearing Officer Donnelly rendered his adverse decision against plaintiff without affording plaintiff an opportunity to offer rebuttal evidence."

In petitioner's June 11, 1993 post-termination decision (Opening brief, exhibit J), Hearing David Donnelly demonstrated personal bias when he, subsequent to the May 13, 1993 post-termination hearing , he *"discovered a letter"* and relied upon that evidence. According to *Mathews v. Eldridge, 424 U.S. 319, 335,* (1976), petitioner was denied his fundamental right to confront this evidence against him; notwithstanding the expert witness. This evidence was used in the deprivation of petitioner's constitutionally protected property rights. Hearing officer David Donnelly's actions conflict with Clements v. Airport Authority of Washoe County, 95 C.D.O.S. 8316,(9th cir), in which this court held;

> *"Indeed, the requirement that proceedings which adjudicate individuals' interests in life, liberty, or property be free from bias and partiality has been "jealously guarded."* Marshall v. Jerrico, 100 S. Ct. 1610, 1613 (1980). Later on they stated, ***"The inadequacy of the post-termination process may itself be the source of a distinct due process violation."*** (Loudermill, 106 S.Ct. at 1496).

Certainly the appellate court's memorandum disregarded the clear fact that hearing officer David Donnelly admittedly involved himself in the investigation and used evidence against petitioner without affording petitioner his right to confront. On page 5, citing Mathews v. Eldridge, the appellate court erroneously concluded that petitioner did not show that withholding the city attorneys' letter, *and his inability to cross-examine the author of that letter, affected his "opportunity to be heard at a meaningful time and in a meaningful manner."*

However, Mathews does not support the appellate court's conclusion , but in fact contradict it. **The memorandum's** conclusory **statement is impossible.** The appeals court's memorandum erroneously extrapolated the petitioner's May 13, 1993 post-termination hearing to the *farthest reaches of*

indeterminacy. How could petitioner confront evidence used against him if he was not informed of it until **a month after his post-termination hearing ?** (June 11, 1993). The evidence was used against petitioner, must be discovered, confronted and submitted to the wisdom of a jury. The respondents **generated this** evidence and it is still unknown to petitioner what information respondent Szczepaniak supplied to the city attorneys' office. The city attorneys' letter stated; ***"Based upon the information you supplied our office regarding your employee, Ray Watson, we do not feel we can successfully prosecute the cases submitted our office where we would depend on Mr. Watson's testimony."*** (See opening brief exhibit H.) In Ortez v. Washington County, 88 F3d 804,807 (9th Cir. 1996), the Ninth circuit appeals court held;

> *"He also sufficiently alleges a denial of due process, claiming he was not afforded the opportunity to be heard in a meaningful* manner. *Id. at 1554 (stating that "[a]t a minimum, due process requires notice and a hearing where the individual has a meaningful opportunity to confront the evidence against him"); Mathews v. Eldridge, 424 U.S. 319, 335 (1976)".*

> *"Ortez's allegations, including the allegation that defendants refused to provide him with the information upon which the charges of graft were based, set forth a sufficient claim that he was denied a meaningful opportunity to refute the charges against him and to clear his name. Brady, 859 F2d. at 1554. While further discovery may reveal that, when considered in their totality, the procedures available to him did provide him with ample* opportunity to be heard and confront the evidence against him, ***his complaint sets forth allegations that, if proven, would entitle him to relief".***

D.

David *Donnelly was not Barred*

Petitioner's opening brief (page 10, line 11) stated: *"Trial court dismissed plaintiff's original complaint on June 29, 1995, but granted appellant leave to amend. Trial court said in its June 29, 1995 order #8(See App B) that all claims after February 24, 1993 are not barred by the statute of limitations."* A post-termination hearing by David Donnelly was held on May 13, 1993.

Thus, the termination and all claims in this action occurring after February 24, 1993 are not barred by the statute of limitations.[2] However, the appellate court's memorandums decision (A3, par 2) held, without any legal foundation, that " *Watson's federal claims against defendant Donnelly were barred under Nevada's two year statute of limitations . See Nev. Rev. Stat 11.190(4)(e)."* In trial court order (A17, par. 1), the court stated that *the "amended complaint will supersede the original complaint".*

Petitioner filed his amended complaint on July 27, 1995, naming David Donnelly as a defendant in the caption of that complaint (see docket sheet).In fact, petitioner refers this court to his opening brief (page 12, line 12) in which he stated;

> *"Appellant filed his amended complaint on July 27, 1995, naming Hearing Officer David Donnelly as a defendant in the caption " Hearing officer David Donnelly was named in appellant's original complaint on count 53 but was not written in the caption. District court clearly understood that Hearing Officer David Donnelly was a defendant and appellant referred to him numerous times as "Hearing Officer".*[3] *District court was aware, that pursuant to*

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[2] Recall that petitioner filed this action on February 24, 1995 and is not barred by the statute of limitations.

[3] See Exhibit L: Court order (#8), page 5, line 22; page 6, line 8, 9; page 6, line 5;

Haines v. Kerner, 404 U.S. 519 (1972), "a pro se litigant is not held to the same stringent standards of a lawyer" . (see order #8, Page 2, line 16.) The complaint count 53 states: "That defendant William Szczepaniak and Hearing Officer David Donnelly, with willful and wanton disregard for Appellant's substantive due process rights,refused to offer written legal justification, blatantly stating: This was an oral opinion, no written opinion was provided, or will be provided".

In fact, Federal rule of civil procedure 15(c) states:

(1) *"An amendment of a pleading relates back to the date of the original pleading when;*

(2) *"The claim or defense asserted in the amended pleading arose out of the conduct, transactions, or occurrence set forth, or attempted to be set forth in the original pleading.*

The fact of the matter is, the Ninth Circuit Court of Appeals clearly interpreted the application of this rule in Eaglesmith v.. Jack Ward, Mendocino County Superintendent of Schools, 73 F3d 857 (9th Cir. 1995) holding;

"Under Rule 15(c), an amendment seeking to change a party relates back to the date of the original complaint if (1) the amendment arose out of the same condition or transaction as the original complaint and (2) the party being added had notice and is not prejudiced by the amendment". See Percy v. San Francisco General Hosp., 841 F.2d 975, 978 (9th Cir. 1988).

Additionally, in Ortez, (a pro se litigant), the appellate court held;

"However, defendants contend that Ortez failed to set forth his *Title VII claims until his second complaint, well after the allotted time for filing a timely claim had expired. The District court found that Ortez's first complaint, which stated that "I am filing under title 7 Civil Rights Act of 1964" sufficiently* set *forth a Title VII claim despite the defectiveness of the pleading. We affirm this*

holding as well,because having been adequately referenced in his originalcomplaint, Ortez's Title VII claims were not barred by the statute of limitations". (Ortez v. Washington County, 88 F3d 804, 807(9th Cir. 1996))

Likewise here, petitioner referenced Defendant David Donnelly in his original complaint filed February 24, 1995,(A21, count 53) and served him notice of the amended complaint on August 1, 1995 (see docket sheet, #13). Additionally, FRCP 15 (c) was cited in petitioner's appeal opening brief (page 13, line 6) to counter the groundless argument that Donnelly was barred, but it was disregarded by the appellate court. As shown above, the appellate court even disregarded its own **controlling case law regarding FRCP 15 (c) and did not maintain uniformity with its decisions.** The appellate court's **erroneous refusal** to address these material facts in their memorandum decision, or judgment, constitutes manifest injustice and an abuse of discretion. Thus, their groundless holding that Donnelly was time barred conflicts with the (1) supreme court, (2) other circuits and (3), even fails under the Ninth Circuits' own controlling cases such as Eaglesmith and Ortez v. Washington County, State of Oregon, 88 F3d 804, 807(9th Cir. 1996).

E.

Petitioners' Substantive Claims Not Barred

In its order #8, (A14, par.1) the trial court stated; *"claims related to his post-termination hearing arose from facts occurring after February 24, 1993, those claims are not barred by the statute of limitations.* Conversely, on page 7, line 1,the court continues; *"Watson's complaint makes it absolutely clear that he cannot amend to cure the statute of limitations bar or to state a claim based upon substantive due process"* Since petitioner's procedure due process claims are not barred by the statute of limitations, therefore his substantive claims are also not barred. Both claims occurred simultaneously after February 24, 1993. *"There can be no doubt that the Due Process Clause of the Fourteenth Amendment confers both procedural and substantive rights"*. See Foucha v Louisiana, 504 U.S. 71, 80 (1992); United States v. Salerno, 481 U.S. 739, 746 (1987); Daniels v. Williams,

474 U.S. 327, 331 (1986). Therefore, since petitioner's claims are not time barred, petitioner is entitled to all claims occurring after February 24, 1993. Moreover, petitioner's substantive claims are guaranteed by the United States constitution. In **Daniels v William**, 474 US 327, 88 L Ed 2d 662, **672**, **673**, US 327, 106 S Ct 662, the court held:

> *"Thus, the state, as well as the Federal Government, must comply with the commands in the First[4] and Eighth[5] Amendments; so too, the state must respect the guarantees in the fourth[6], Fifth and sixth Amendments".*

Second, it contains a substantive component, sometimes referred to as "substantive due process", which bars certain arbitrary **government actions "regardless of the fairness of the procedures used to implement them".** Daniels continues on page 673; Similarly, if the claim is in he second category(a violation of the substantive component of the due process clause), a plaintiff may also invoke § 1983 regardless of the availability of a state remedy[7]. For, in that category, no less than with the provisions of the bill of rights, if the Federal *Constitution prohibits a state from taking certain actions "regardless of the fairness of the procedures used to implement them",* ***"the constitutional violation is complete as soon as the prohibited action is taken; the independent federal remedy is then authorized by the language and legislative history of § 1983".***

The above material points of fact and law, which was provided by petitioner on page 10 through 11 of his opening brief, were disregarded, or was not construed in a light most favorable to this pro se petitioner. In Yamaguchi v. United States Air Force, 95-17266, the Ninth Circuit Court of appeals held;

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[4]See Douglas v Jeanette, 319 US 157, 87 L Ed 1324, 6 S Ct 877 (1943).
[5]See Robinson v California, 370 US 660, 8 L Ed 2d 758, 82 S Ct 1417 (1962)
[6]See Map v Ohio, 367 US 643, 6 L Ed 2d 1081, 8 S Ct 1648 (1961)
[7]Cf. Parratt v Taylor, 451 US 527, 545, 68 L Ed 2d 420, 101 S Ct 1908 (1981) (Blackmun, J, concurring);Roe v Wade, 410 US 113, 35 L Ed 2d 147, 98 S Ct 705 (1973).

"Rule 8(f) of the Federal Rules of civil Procedure requires a liberal reading of complaints"[A]A dismissal must be reversed unless it appears to a certain y that the plaintiff is entitled to no relief under any set of facts that could be proved. Ascon Properties, Inc. Mobil Oil, 866 F.2d 1149, 1155 (9ty Cir. 1989)FRCP 8(a)(2))Also see .Danning v. Lavine, 1572 F.2d 1386, 1388-89 (9th Cir. 1978); Conley v.Gibson 355 U.S. 41, 47 (1957);.

It is obvious that the appellate courts' memorandum and trial court's denial of petitioners' claims, did not maintain uniformity with Ninth Circuit and Supreme court decisions. Nor did either entity construe petitioner's amended complaint liberally, in direct conflict with Yamaguchi and other cited cases.

F

Sanctions Against Petitioner Must Be Reversed

Without a complaint at issue, or a discovery scheduling order, the respondents demanded petitioner's deposition on January 9, 1995. Petitioner filed a motion for a protective order on December 12, 1995, arguing (1*) that the court had not ruled on his amended* complaint, *(2) that no claims for relief, if any, were defined, (3) that the court had not issued a discovery scheduling order pursuant to local rule 190-(1)(2).* On December 14, 1995, the trial court denied petitioners' motion for a protective order and ordered him to appear for his deposition on January 9, 1995. On January 5, 1995, petitioner called the opposing attorney Keith Kizer, to inform him that petitioner could not attend his January 9, 1996 deposition because of personal reasons. Despite the lack of jurisdiction, the trial court ordered petitioner to take a deposition and even imposed arbitrary sanctions on petitioner without complying with district court local rule 100-3. The rule states; "*the court may, after notice and an opportunity to respond, impose any and all sanctions authorized by statue or rule".*

On January 29, 1996, respondents filed a motion for rule 37 sanctions for failure to attend the January 9, 1996 deposition and to

dismiss petitioners' complaint with prejudice if he failed to attend his February 22, 1996 deposition. On February 5, 1996, after eight months of discovery and litigation, the court issued a discovery scheduling order to be completed by April 1, 1996. **Petitioner attended his February 22, 1996 deposition.** Finally on March 25, 1996, the trial court issued a ruling on petitioners amended complaint and dismissed Hearing Officer as a defendant. Also, without complying with local rule 100-3, the court ordered that petitioner *"must pay defendant's reasonable expenses including attorney fees caused by his failure to attend his deposition"*. The trial court imposed *ex post facto* punishment for an alleged event when the facts show there was no complaint or jurisdiction established.

In addition, the trial court never gave petitioner notice of its intentions, or a hearing to determine his intent or the true facts. In **Loudermill v. Cleveland Board of Education**, 470 US 532, (1985), the court held; *"the essential elements of procedure due process are notice and an opportunity to be heard."* Both the trial *and* appellate courts ignored the true facts and law, erroneously holding that petitioner was *"uncooperative"*, *"failed to attend his deposition"* and sanctioned him **$3,184.01**.

These disingenuous statements fail since there was never any "(1) *willful noncompliance,* (2) *halt in the adversarial process,* (3) *prejudice to respondents* or (4) **failure by petitioner to attend his deposition.** The sanction was arbitrary, illegal, manifestly unfair, based on an erroneous assessment of the facts and an abuse of discretion. The above events, occurring prior to March 25, 1995, without jurisdiction or a complaint at issue, are clearly a departure from the accepted and usual course of judicial procedure.

Thus, the trial courts' commencement of discovery, the imposition of sanctions and failure to follow local rules 100-3 and 190-(1)(2), are an abuse of discretion and must be reversed in light of Ghazali v. Moran 46 F 3d. 52 (9th Cir. 1995). In Ghazali, the court held that; *"failure to follow a district court local rule is proper ground for dismissal"*.

G

Protective Order Inappropriate

Petitioner subpoenaed the depositions of the Clark County Commissioners (the governing body of the Las Vegas Valley Water District) and Patricia Mulroy, the Las Vegas Valley Water District General Manager. On January 5, 1995, petitioner appeared before a magistrate judge to argue in opposition to respondent's motion for a protective order for the above witnesses. The respondents argued that they *"did not have personal knowledge"* of petitioners' termination.

As material disagreements existed regarding the work rules and petitioners' termination by Supervisor William Szczepaniak, he argued that the commissioners are the governing body for the Las Vegas Valley Water District, and the creators of the ***"Management Work rules Handbook"*** governing employment conditions and terminations. Moreover, the Management Work Rules Handbook, page 3, section 1.2.1 succinctly states;

> *"It is the intent of the board to establish policy and reserve authority for making policy unto themselves, and it is the intent of the Board for the General Manager to implement and execute such policy, and make recommendation to the § board."*

The respondents argument that these witnesses did not have *"personal knowledge"* is disingenuous. Sufficient facts was proffered to support petitioners assertion that they did have personal knowledge and must be deposed.. For instance, prior to bringing this action, petitioner wrote, called and made numerous attempts to speak to the commissioners. In fact, he wrote each commissioner personal letters and even prepared detailed, personalized accounts of his wrongful termination. They refused to accept his information with one commissioner stating, *"we can't accept that... we could be defendants"*.

Even though **NRS 41.036** required petitioner to take his case to the commission as a conditions precedent to a legal action, they adamantly refused to hear or consider any information petitioner offered. Desperately seeking a hearing with the commissioners, petitioner ascended to the podium during a general meeting, but was cut short by being informed that he was not on the "*agenda*". He then asked to be placed on the agenda but was never placed on any agenda.

The commissioners and the general manager *had personal knowledge* but continued to frustrate petitioners' efforts to have them review his wrongful termination. Petitioner tried everything to avoid this litigation - to no avail.

In the February 5, 1995, the magistrate acknowledged petitioners' desperate attempts to communicate with these witnesses saying they "*probably hit your touch points*" by refusing to hear your grievance. Thus the trial courts' assertion that they did not have specific knowledge of petitioners' termination is wrong. They did have "*specific information*" of petitioners' termination but choose a path of **deliberate ignorance**. As mentioned, these arguments were made to the trial court but were disregarded in its granting of a protective order.

During the January 5, 1995 hearing, petitioner also asked the magistrate **why there was not a ruling on petitioners' amended complaint, and how were these proceedings legal.** The magistrate judge said he could not rule on petitioners' amended complaint and that the district judge had to rule on his amended complaint. Petitioner then asked about the scheduling order pursuant to local rule 190-1, and the magistrate said that that it was not required. After granting respondents' motion for a protective order, the magistrate said petitioner " *submit written interrogatories to the Water District and depose other Water District employees". (App. K, Docket sheet # 23).* This judge certainly knew that sending interrogatories to persons not bound by the authority of the court was an exercise in futility. Thus, the trial courts' statement was deliberately disingenuous and an abuse of discretion.

Even more devastating to petitioners' right of due and fair process was the courts arbitrary protection of witness Patricia Mulroy, the general manager of the Las Vegas Water District. Patricia Mulroy had *"final authority"* in the termination of petitioner, had specific knowledge and must deposed. In fact, not only do the Management Work rules give this witness singular authority to ensure terminations are conducted pursuant to *"Due Process Right for Management, supervisory and Confidential Employees, document 110, "* (A23), **petitioner even sent a detailed, certified letter to her home and office addresses.** That letter clearly explained all aspects of petitioners' wrongful termination and respectfully asked for her personal intervention. Thus the appellate court were wrong its memorandum stated;

> *"Watson failed to allege that the commissioners or the district manager had any personal information revelant to his case"*

In light of fair process, **Jones v. Clinton, 117 S. Ct. 1636 (1997)** notwithstanding, the trial courts' protective order was inappropriate and volatile of **petitioners'** right of due process. As a public employee, petitioner cannot be denied his constitutionally protected interests by arbitrarily protecting General Manager Patricia Mulroy and the county commissioners.

H

Trial And Appellate Court Failed To Address Respondent William Szczepaniak

Petitioner was terminated in violation of management work rule 4.6.1, (see A26), by defendant William Szczepaniak on March 31, 1993[8]. The appellate court's memorandum admitted that petitioner was ***"a public employee with a due process property right in his employment"***. *Sweikert v. Briare, 588 P.2d 542, 544 (Nev. 1978)* (see A3, par. 1.) Therefore, petitioner has a

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[8] Appellate's' Opening Brief, page 4, line 5; Petition for Rehearing, page 7, line 25, Trial Court Plaintiffs' Motion in Opposition to Defendant's Motion for Summary Judgment (docket # 52).

constitutional entitlement to the provisions specified in the Las Vegas Valley Water District procedure Document 110, issue 1; " (A23), **Due Process Rights for Management, supervisory and confidential Employees**[9]. In Stiesberg v. State of California, 80 F3d 353(9th Cir 1996), this court held:

> *"A threshold requirement to a substantive or procedure due process claim is the plaintiff's showing of a liberty or property interest protected by the constitution." "A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source, such as state law. A reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms. Although procedure requirements ordinarily do not transform in a unilateral expectation into a protected property interest, such an interest is created if the procedure requirements are intended to be a significant substantive restriction on decision making."*

According to Stiesburg, it is an undisputed and well settled fact that **petitioner** has a protected property interest in these rules. The **Due Process Rights for Management- supervisory and Confidential employees**[10], document 110, issue 1, (which is regulated by the Management Handbook Work rules, (*see A23*) in event of termination from employment), Rule 4.6.1[11] states:

> *"Employees, other than the general manager, deputy general manager and department heads, by be removed by their respective **department heads or division heads**, but may appeal such removal to the general manager. The decision of the general manager will be final."*

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[9] Petitioner's opening brief, Exhibit E.

[10] Opening brief, exhibit E: Due Process Rights for Management, Supervisory and Confidential employees.

[11] Opening brief, exhibit F: Excepts of record: Management Work rules.

The trial courts' order # 73 (A5) and the appellate court's memorandum (A1) failed to address the material point of fact and law, that pursuant to Management Works Rules Handbook, rule 4.6.1, William Szczepaniak is a supervisor[12] and **was not authorized to terminate petitioner.** Defendant William Szczepaniak is **neither a division head or department head** (See A27). In Ahmad v. Southwest Gas Co., 668, P.2d 261 (Nev. 1983), the Nevada Supreme Court held:

> *"The issue in this case is whether or not the parties are **bound by a termination clause** appearing in the employee information and benefits handbook, provided to Ahmad by Southwest Gas. The trial court found that the handbook created employment and contractual rights between the parties and that Southwest violated the contract."*

Again, both the trial and appeals court failed to address these controlling points of fact and law. And those points of facts and law, pursuant to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986), definitely create **genuine issues sufficient to defeat the respondents motion for summary judgment**. By their outrageous refusal to address petitioner's procedure due process right to the Management Work Rules, the courts have effectively, *"decided a federal question in a way that conflicts with courts of last resort"*. Specifically, those cases were Ahmad and Anderson.

I

Courts Never Addressed Petitioner's Brief

By their own admission in their judgment, the appellate court relied on the transcript of the record rather than petitioner's appeal brief. In its judgment dated January 29, 1998, the court held: *"THIS CAUSE came on to be heard on the Transcript of the Record from the United States District court for the District of Nevada (Las Vegas) and duly submitted."* Further, it is the brief, and not the records from the trial court can define the issues and

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[12] Opening brief, exhibit D; Defendants interrogatories.

arguments that petitioner brought to the *appeals* court. And amazingly, those **briefs were never addressed in the appellate court's memorandum or judgment.** Clearly, this was an outrageous departure from the accepted and usual course of judicial proceeding and calls for an exercise of this court's supervisory power.

J

Second Amended Complaint

The trial and appellate court (A3, par.3) held that petitioner did not *"comply with the local rules"* because his amended complaint *"did not contain points and authorities"*. The amended complaint referred to the *"Trial court of Nevada"* as a legal authority but the trial court refused to accept the assertion that it is, in fact, a legal authority to be cited and quoted. Pursuant to congressional mandate, the trial court of Nevada is a federal judicial body and is a legal authority. Further, a few days later petitioner submitted **"Additional Points And Authorities"** to the court. The respondents were not prejudiced and their substantial rights were not disparaged in any manner.

Neither was the judicial process delayed or affected by a few days. Thus the trial courts' unreasonable refusal to allow petitioners' amended complaint is *"inconsistent with substantial justice. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."* **(FRCP 61).** The litigation process should be driven by law, fairness and the merits of the case. *"It is not a game of skill"*, where on alleged misstep by a pro se litigant outweighs his constitutional right of due process. For instance, it is patently disingenuous ***on the one hand***, for the trial court rule that petitioner did not abide by the rules. Meanwhile ***on the other hand***, the same court conducted illegal proceedings without a complaint or jurisdiction for eight months.

Clearly, the courts' denial of petitioners' motion to amend represents *"the hyper-technical application of the rules resulting in form over substance"*.(Ready v. Jamison, 705 SW2d 479 (Ky

1986), Majority Opinion; (2) Nolph v. Scott, 725 SW2d 860 (Ky 1987). The trial courts' action, as well as the appellate courts' affirmation of this issue was another manifest abuse of discretion and a reckless denial of petitioners' substantive rights.

8.

Reasons for Granting the Petition

The Ninth Circuit Court of Appeals Memorandum decision is in direct conflict with this courts' decisions in (1) *Ricks* regarding when harm begins in an adverse employment decision, (2) *Daniels*, regarding petitioner's substantive due process rights,(3) *Loudermill*, regarding petitioners' procedure due process rights, (4) *Anderson*, regarding the existence of a genuine issue of material fact and (5) its *departure* from the accepted and usual course of judicial procedures, (6) its denial of petitioners' *Fourteenth Amendment rights*. These are direct conflicts justify` summary reversal of the Ninth Circuit Courts' decision.

In addition, the decision is in direct conflict with the Ninth Circuit's own decision in Aronsen v. Crown Zellerback, 662 F 2d. 584; citing *Ricks*. The court held that *"harm begins when the adverse decision is communicated to the employee"*. Finally, the questions presented in this case is of national importance because the trial and Appellate courts deprived petitioner of equal protection of the laws which is guaranteed by the 14th Amendment.

1.

THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THIS COURTS' DECISIONS.

A.

Ricks: "Harm"

In Delaware State College v. Ricks, 449 US 250, 258, this court held that *"accrual generally occurs at the time the [adverse employment] decision was made and communicated to the employee"*.

Petitioner was **Re-instated to employment** by the respondents, on **February 25, 1993**, given a notice of intent to terminate by supervisor William Szczepaniak on **March 4, 1993** and was terminated by Szczepaniak on **March 31, 1993**. Thus, **March 4, 1993** was the correct accrual date *(harm)* for determining the statute of limitations according to Bagley. V. CMC Real Estate Corp., 923 F2d 758, 760 (9th Cir. 1991), cert. Denied 112 S Ct 1161 (1992)

According to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), the court will consider *"[o]nly disputes over facts that might effect the outcome of the suit under the governing law"*. Therefore, the Notice of Intent to Terminate communicated to petitioner by Supervisor William Szczepaniak on March 4, 1993, created a genuine issue sufficient to defeat a motion for summary judgment.

B.

Daniels: Substantive Due Process

In Daniels v Williams, 474 US 327, this court held that substantive due process rights were guaranteed by the constitution. The Appellate courts' rule 36-1 requires a *reasoned disposition for their decision*. The appellate courts' decision is in direct conflict with its own court rules and Daniels. Petitioner has a constitutional right to have the Appellate court give a reasoned disposition - as opposed to a vague, conclusory decision; even omitting genuine issues presented by petitioner. Petitioner, a public employee, is entitled to such substantive rights as to why;

(1) petitioners' case was barred by the statute of limitations,
(2) David Donnelly was barred by the statute of limitations contrary to FRCP 15(c),
(3) The Appellate court did not address the genuine issue in Petitioner's brief that William Szczepaniak was not authorized by the Management Work Rules to terminate petitioner.
(4) The Appellate court affirmed arbitrary sanctions against petitioner - which were applied without notice and an opportunity to respond from the trial court,
(5) The trial and appellate courts departed from the principle of stare decisis,
(6) Many genuine issues of material fact and law were ignored while affirming a summary judgment.

C:
Loudermill: Procedure Due Process

In Loudermill, this court held that the essential elements of procedure due process are notice and an opportunity to respond. Consequently, petitioner has: (1) the right to contest and rebut all evidence to be used against him, (2) the right against unfair sanctions without due process. The Ninth Circuit was in direct conflict with Loudermill by affirming the respondents' withholding of evidence .

D:
Departure From Accepted Judicial Procedures

It is clear that the lower courts have taken undue advantage of a pro se litigant who is untrained in the profession of law and cavalierly "*departed from the accepted and* usual *course of judicial proceedings as to call for an exercise of this courts supervisory powers.*" **One such outrageous departure** was the fact that the trial court conducted legal proceedings for eight months without (1) a ruling on petitioners' amended complaint, (2) any way of determining what the issues were before the court (3) jurisdiction or (4), a discovery scheduling order pursuant to LR 190-(1)(2). For example, what if petitioner had gone to the expense to depose David Donnelly only to later learn that the court had dismissed him on March 25, 1996. In fact, this is precisely what the trial court did on March 25, 1996.

The trial court cavalierly dismissed David Donnelly after the litigants had expended time and money for months *assuming* Donnelly was a party. Furthermore, the trial court imposed sanctions on petitioner without jurisdiction for **$3,184.01**- without the court giving petitioner notice and opportunity to respond. The judiciary has long held; *"Courts without jurisdiction have no immunity, or authority to act, and their rulings are nullities, because no judge is present that day"*. Crouch v Cameron, 414 SW2d 408 at 409, (1967), FRCP 60 notwithstanding.

Another outrageous **departure** from accepted judicial procedure was the appellate courts' affirming that petitioners' claims were barred by the statute of limitations, without providing

any foundation or conclusions of law. Petitioner has a due process right to receive a decision of law rather than conclusory statements.

Petitioner has provided numerous instances where the lower courts have decided several important federal questions in a way that conflicts with revelant decisions of this court. In dismissing David Donnelly in petitioners' amended complaint, they deliberately ignored FRCP 15(c) and their own controlling Ninth Circuit case law such as Ortez v. Washington County, 88 F3d 804, 807(9th Cir., and Eaglesmith v.. Jack Ward, Mendocino County Superintendent of Schools, 73 F3d 857 (9th Cir. 1995).

On page 3, par.1 of its memorandum, (A30), the appellate court held that petitioner did not allege violation of a *"fundamental right"*. This conclusory and erroneous statement conflicts with McCalden v. California Library Assn., 955, F2d 1214, 1223-24 (1990) and Mckenny v. Renne, 94-15179(1996). The appellate court departed from the accepted and usual course of Judicial proceedings by not addressing the issues presented in petitioners' appeal brief. On the cover page the memo states; *"we may affirm on any grounds supported by the record. See Granite State Ins. Co. V. Smart Modular Techs., Inc. 76 f 3d 1023, 1026 (9th cir 1996).*

However, not only did the appellate court affirm matters **not supported by the** *record*, it totally ignored clearly articulated genuine issues, material conflicts of law and fact in its conclusory, unpublished memorandum. The appellate court's affirmation of the trial court's summary judgment failed to view petitioners' evidence in a most favorable light when genuine issues exist. For example, petitioner submitted clear evidence to support the material fact that respondent William Szczepaniak did not have authority to terminate him. Neither lower court bothered to address this issue and still found a way to grant a summary judgment. To allow the trial and appellate courts to depart from accepted and usual course of judicial proceedings is to condone manifest injustice and repudiation of the principle of *stare decisis*. It is especially injurious to pro se litigants and other citizens who are not trained in the profession of law.

9.

The Questions Presented are Important

Petitioner, a public employee and pro se litigant, not skilled in the profession of law, was deprived of his constitutional rights as secured by the Fourteenth Amendment and well settled case law. That deprivation was also administered by the appellate courts' memorandum decision which departed from the principle of stare decisis and ignored genuine issues presented by petitioner.

By simply ignoring the Fourteenth Amendment, where the pro se litigant or persons similarly situated is concerned, the appellate court increased its chances of denying constitutional rights; since the chances of obtaining a writ of certeriori from this court is approximately one percent The departure of the appellate court from the principle of stare decisis has caused petitioner to seek this courts' supervisory power to restore petitioners' constitutional rights and ensure the rights of those persons similarly situated.

11.

Conclusion

Because the Appellate courts' memorandum violated petitioners constitutional rights, it is in direct conflict *Ricks, Aronsen, Anderson* and other controlling case law. For these reasons, the memorandum decisions of the Ninth Circuit Court of Appeals should be summarily reversed, vacated and this action remanded to the United States District Court for the District of Nevada. (A30, par. 2). In the alternative, the petition for a writ of certeriori should be granted.
Respectfully submitted,

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Appendix

A1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Filed September 12, 1997)

Ray Watson, Plaintiff-Appellant, v. **William Szczepaniak, Las Vegas Valley Water District,** Defendants-Appelles	No. 96-17290 DC no. CV-95-00189-LDG/RJJ **Memorandum***

Appeal from the United States District Court
For the District of Nevada
Lloyd D. George, District Judge, Presiding
Submitted September 8, 1997**
Before: Hall, Brunetti, Thomas, Circuit Judges.

Ray Watson appeals pro se the district court's summary judgment in favor of defendants in his 42 U.S.C. § 1983 action alleging that his constitutional rights were violated when he was terminated from the position of water enforcement officer for the Las Vegas Valley Water District. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm. 1/

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th cir. R. 36-1.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed R. App. P. 34(a); 9th Cir.

1/ We may affirm on any grounds supported by the record. See. Granite State Ins. Co. v. Smart Modular Techs,. Inc., 76 F. 3d 1023, 1026 (9th Cir. 1996).

A2

Watson contends that the district court erred by granting defendants' motion for a protective order prohibiting the dispositions of county commissioners and the water district's general manager. We review the district courts' ruling concerning discovery for abuse of discretion. See Brown Bag Software v. Symantec Corp. 960 F. 2d 1465, 1469 (9th Cir. 1992). Watson failed to allege that the commissioners or the district manager had any personal information relevant to his case. Accordingly, the district court did not abuse its discretion in granting the protective order. See Id.

Watson contends that the district court erred by dismissing his first cause of action, consisting of claims arising from his termination and post-termination hearing. The district courts' dismissal of these claims pursuant to Fed. R. Civ. P. 12(b)(6) will be upheld only if the plaintiff would be entitled to no relief under any set of facts that could be proven. See Jones v. Community Redevelopment Agency, 733 F. 2d 646, 648-49 (9th Cir. 1984).

To the extent that Watson's claims of violation of his constitutional rights arise from his termination, the district court correctly dismissed them as barred by the revelant statute of limitations. see Wilson v. Garcia, 471 U.S. 261, 276 (1985);Nev. Rev. Stat. § 11.90 (4)(e).

However, Watson also claimed violations of his rights to procedural and substantive process arising from his termination hearing, which were not barred by the statute of limitations. See Wilson v. Garcia, 471 U.S. 261, 276 (1985); Nev. Stat. § 11.190(4)(e). Nevertheless, because Watson did not allege facts implicating the violation of a fundamental right, and the defendants' decision to terminate him was at least rationally related to a legitimate government interest, he failed to make out a claim for violation of his substantive due process rights. See Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F 3d 56, 66 (9th cir. 1994).

Watson also alleged that the employer-appointed hearing officer at his post-termination hearing was biased, violating his

A3

right to procedural due process. Watson was a public employee with a due process property right in his employment. See Sweikert v. Briarre, 588 F. 2d 542, 544 (Nev. 1978). Because Watson failed to allege sufficient facts showing personal or institutional bias on the part of the hearing officer, the district court did not err in dismissing this claim under Fed. R. Civ. P. 12(b)(6). See Jordan v. City of Lake Oswego, 734 F. 3d 1374, 1376 & n.1 (9th Cir. 1984).

Watson contends that the district court erred by granting defendant Donnelly's motion to dismiss. Watsons' federal claims against defendant Donnelly were barred under Nevada's' two-year statute of limitations. See Nev. Stat. § 11.190(4)(e). Accordingly, the district court did not err by dismissing these claims. Se id.

Watson contends that the district court erred by refusing to permit him to file a second amended complaint after the defendants had already filled responsive pleadings. We review for abuse of discretion the district courts' denial of leave to amend the pleading after a responsive pleading has been filed.. See Jones 7343 F 2d at 650. Watson failed to comply with the district courts' local rules to his motions to amend his complaint. See D. Nev. Local R. 140-3. Accordingly, the district court did not abuse its discretion by denying them. See Ghazali v. Moran, 46 F 3d 52, 54 (9th Cir. 1995))(per curiam).

Watson contends that the district court erred by imposing sanctions on him for failing to attend a scheduled deposition. We review the courts' imposition of sanctions for failure to comply with discovery for abuse of discretion. See United Artist Corp. & L.P.A.A. v. La Cage Aux Follies., Inc., 771 F 2d 1265, 1270 (9th Cir. 1985). Watson received notice of the sanctions and opportunity to respond before they were imposed. Moreover, the district court had good cause to impose the sanctions in light of Watson's refusal to cooperate with defendants' attempts to take his deposition. Watson's arguments that sanctions were inappropriate because the court allegedly failed to issue a scheduling order are inapposite. Accordingly, the district court

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did not abuse its discretion in imposing the sanctions on Watson See id.

Watson contends that the district court erred by granting defendants' summary judgment motion on Watsons' claim that defendants' failure to reveal certain evidence to Watson during his termination process constituted a violation of his due process rights, and erred by granting defendants' summary judgment on Watsons' pendant state claim. We review the grant of summary judgment de novo. See Jesinger v. Nevada Credit Union, 24 F 3d 1127, 1130 (9th Cir. 1994). Watson failed to show that the withholding of the March 5, 1993 letter from the city attorneys' office, and his inability to cross-examine the author of the letter, affected his opportunity to be heard at a meaningful time and in a meaningful manner. See Mathews v. Eldridge, 424 U.S. 119, 333 (1976). Accordingly, the district court did not err by dismissing this claim. See Jesinger, 24 F 3d at 1130. **Affirmed.** 2/

1/ We decline to address Watsons' contentions regarding Richard Wimmer as they are raised for the first time on appeal. See Brogan v. San Mateo County, 901 F 2d 762, 765 (9th Cir. 1990).

A5

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Ray Watson Plaintiff,	**(Filed November 4,1996)**
v.	CV-S-95-0189-LDG(RJJ)
William Szczepaniak, et. al., Defendants.	**ORDER**

Before the court are:

Defendants motion to lift Stay (#58; Plaintiffs' Non-Opposition(#61); Plaintiffs' Response to defendants; Statement of Reasonable Attorneys' Fees and Costs (#69);

Defendants Motion for summary Judgment (#51); Plaintiffs Opposition(# 52); Defendants Reply (#56); Erratum to Defendants Reply (# 57); Plaintiffs' Supplemental (#68); Defendants Supplemental (#70).

1. Facts

Plaintiff, Ray Watson, was hired as a security officer by the Las Vegas Valley Water District on July 18, 1990. On September 26, 1990, Watson listed Londa Francis as his wife on the enrollment forms to the Districts' health care provider, Sierra Health and Life Insurance Company. On December 6, 1990, plaintiff requested dependant health insurance coverage for Londa Francis again, listing her as his spouse. Plaintiff and Londa Francis were not married until February 28, 1993. At the time plaintiff listed Londa Francis as his spouse, both plaintiff and Londa Francis were each married to others. The District and its benefit plan paid approximately $4, 595.76 in insurance premiums and benefits for Londa Francis before she married plaintiff.

On October 9, 1992, Plaintiff received a citation for driving without automobile insurance. On or about December 12, 1992, a letter informing plaintiff that his drivers' license had been

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suspended was sent to plaintiff's home. Plaintiff alleges that he did learn of the letter until January 12, 1993. Plaintiff did not inform anyone at the District about his suspended license and continued driving District Vehicles. Jack Staley, the Districts' director of Support Facilities, confronted plaintiff about his suspended license on January 14, 1993.

On January 19, 1993, plaintiffs' supervisor, William Szczepaniak informed plaintiff that it was his intent to terminate plaintiff, based on driving District vehicles while his license was suspended and his failure to inform his supervisor of his suspension. However, Richard J. Wimmer, the districts' Deputy General Manager, reinstated plaintiff on February 25, 1993 and ordered another predetermination hearing because his first hearing had occurred on short notice. Wimmer also notified plaintiff of two additional issues that Szczepaniak would address (1) Plaintiff allegedly fraudulently identifying Londa Francis as his wife for the purpose of securing group health insurance benefits for her, and (2) his felony conviction for embezzlement in 1989, when plaintiff had informed the District that he had never been convicted of a felony.

On March 4, 1993, Szczepaniak informed plaintiff that he was proposing to terminate him because of (1) the circumstances surrounding his drivers' license, (2) apparent fraudulent obtaining of health insurance benefits for Londa Francis, (3) apparent falsification of information on job application, and (4) apparent inability to qualify under state law for the position of water enforcement officer. Bernard Little, chief Deputy City Attorney for the city of Las Vegas, informed Szczepaniak by letter that due to the felony convictions, the city Attorney's Office did not feel that they could successfully prosecute cases where they would depend on Mr. Watson's testimony.

Plaintiff requested and received a predetermination hearing on March 15, 1993. Plaintiff was terminated from employment on March 31, 1993. Plaintiff appealed Szczepaniaks' decision and received a post-termination hearing on May 13, 1993. At the predetermination hearing, the letter from the city Attorneys' Office was not put into evidence and no reference was made to it, but the

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Districts' counsel did raise the issue of plaintiffs' credibility problem in court due to his felony conviction of embezzlement, which is a crime of dishonesty. On June 11, 1993, Hearing Officer Donnelly upheld Plaintiffs' termination.

11. Procedural History

Plaintiff filed his initail complaint on Fegruary 24, 1995, Naming William Szczepaniak and the Las Vegas Water District as defendants. In Orders #8 and #41, this court dismissed plaintiff's first cause of action with prejudice as to all defendants. Plaintiffs' "fourth cause of action" is merely a request for injunctive relief. Therefore, the only remaining causes are plaintiffs' second cause of action for procedural due process and this third cause of action, a pendant state claim alleging breach of an employment contract.

In Order #41, this court granted sanctions against plaintiff pursuant to Federal rule of civil Procedure 37. Plaintiff moved for a stay and a stay was granted. The court of Appeals for the Ninth Circuit dismissed the appeal. Defendants then moved to lift the stay, and plaintiff filed a notice of non-opposition. Defendants submitted a statement of reasonable expenses incurred due to plaintiffs' failure to appear for his January 9, 1996 deposition (#42). Plaintiff has now filed a Response(#69).

On October 10, 1996, oral argument was heard regarding Defendants' motion for Summary judgment.

111. Defendants' Reasonable Attorney Fees and Costs.

Defendants have submitted an affidavit by Gregory E. Smith, summarizing all the work billed by the law firm of Smith and Kotcha due to plaintiffs' failure to appear for his January 9, 1996 deposition (#42). The charges include telephone calls, drafting letters, researching and drafting pleadings and photocopying charges totaling $2,704.61.

Plaintiff responds to defendants' statement of reasonable expenses by stating that he do not act in bad faith, and although his reason for being unable to attend his deposition was due to his work schedule, he did not divulge his reason tp defense counsel and planned to present his personal reasons to the court. Plaintiff further

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states that Defendants' charges are unreasonable, unfair, inflated and unaffordable.(#69).

Although plaintiff eventually did have his deposition taken, this court granted sanctions against plaintiff due to his pattern of being uncooperative with defendants' attempts to take his deposition. First, Defendants sent plaintiff a letter that he provide a list of available dates. When plaintiff failed to respond, Defendants served plaintiff with a notice of Taking Deposition, setting his deposition for January 9, 1996. Plaintiff moved for a protective order, which was denied by the magistrate judge. then on January 5, plaintiff notified Defendants that he would not be at his deposition for "personal reasons". Asked to give a full explanation, plaintiff refused to elaborate. Subsequently, defense counsel again requested plaintiff to provide available dates and again plaintiff refused to respond. Finally, Defendants moved for sanction. In opposing Defendants Motion for sanctions, (Plaintiff's Opposition #36), plaintiff did not present his reason for missing the deposition to this court; instead he moved for sanctions against the Defendants(#36). Accordingly, having considered Defendants itemized list of reasonable attorney fees and costs and plaintiff response, Plaintiff shall be ordered to pay $ 2,704.61 to the defendants.

1V. Defendants' Motion for Summary Judgment

Summary judgment is proper "if pleading, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P 56. The party moving for summary judgment has the initial burden of showing the absence of a geniune iusue of material fact. See Adickes v. S.H. Kress and Co. 3998 U.S. 144 (1970), and Zoslaw v. CA Distrib. Corp. 693 F 2d 879, 883 (9th Cir. 1982). Once the movant presents evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial Anderson v. Luberty Lobby Inc., 477 U.S. 242, 250 (1986). I f the factual context makes the respondents' claim implausible, that party must come forward with more persuasive evidence than would otherwise

BEST AVAIL

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be n[illegible]essary to show that there is a genuine issue for trial. Celotex Cor[illegible] v. Catrett. 477 U.S. 317, 323-24 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S 574, 586-87 (1986); California Arch. Bldg. Proid. V. Fanciscan Ceramics C., 818 F 2d. 1466, 1468 (9th Cir. 1987). Cert. denied , 404 U.S. 1006 (1988). A material issue of material fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. See Admiralty Fund v. Hugh Johnson & Co. ., 677 F 2d 1301, 1305-06 (9th Cir. 1982).

When faced with a motion for summary judgment, the materail before the court "must be reviewed in a light most favorable to the non-moving party". Adickes v. S.H. Kress and Co., 398 U.S. at 157, and it must appear to a certainty that the plaintiff is not entitled to relief under any st of facts that could be proven under the allegations of the complaint. Halet v. Wand Investing Co,. 672 D. 2d 1305 (9th Cir. 1982). Furthermore, allegations of a prose complaint are held to less stringent standards that formal pleading drafted by lawyers. Haines v. Kerner, 404 U.S. 519 (1972) (per curiam). Finally, summary judgment is not a disfavored procedural shortcut. But an integral part of the federal rules as a whole. Celotex Corp. v. Catrett, supra.

Procedural Due Process Rights

Due process requires that a person be given notice of the case against him and an opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319 (1976). On March 4, 1994. Plaintiff was informed of the intent to terminate him and given notice of the charges and evidence against him. On March 15, 1993, plaintiff received a pretermination hearing. Plaintiff was terminated by letter of March 31, 1993. Plaintiff received a post-termination hearing on May 13, 1993 and am appeal hearing on June 11, 1993.

Plaintiff claims that Defendants violated his procedural due process rights by failing to notify him of evidence against him, specifically, a letter addressed to defendant Szczepaniak, dated March 5, 1993, from the city attorney. The City Attorneys' letter stated that due tp plaintiffs felony convictions, the office felt that they could not successfully prosecute cases which would depend on

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plaintiffs' testimony. The crime of embezzlement involves dishonesty, subjecting plaintiffs' credibility to attack.

The District did not use the March 5, 1993 letter as evidence against plaintiff. Plaintiff had previously been notified that the District had discovered his felony convictions. The letter was merely an opinion by the City Attorneys' Office that the felony convictions subjected plaintiff's credibility as a witness to attack. The letter was not put into evidence in any of the pretermination hearings. Szczepaniak further states in an affidavit that he did not rely on that letter in his decision to terminate plaintiff and "would have made the same decision in the absence of any letter whatsoever". Defendants' motion for Summary Judgment (#52), Exh. C, p.2, Ins. 7-10.

An employee need not give all documentation available to the employee before terminating him. The letter did not contain evidence and was not used against plaintiff. Plaintiff was given notice of all charges against him and had an opportunity to respond to those charges before his termination. Therefore, plaintiffs' procedural due process rights were not violated. Accordingly, Defendants' motion for summary judgment shall be granted.

Pendant State Claim - Breach of Employment Contract

Since all federal claims have been dismissed, plaintiffs' pendant state claim for breach of employment contract shall be dismissed without prejudice. 28 U.S.C. § 1367.

IT IS THEREFORE **ORDERED** that defendants' motion ftp lift stay (#58) is GRANTED. Plaintiff is ordered to pay $2, 704.61 to the defendants as reasonable attorney fees and costs for failing to attend his January 9, 1996 deposition.

IT IS FURTHER **ORDERED** that Defendants Motion for Summary Judgment (#51) is GRANTED as to plaintiffs' second cause of action for procedural due process.

IT IS FURTHER **ORDERED** that plaintiffs' third cause of action for breach of employment contract, is DISMISSED WITHOUT PREJUDICE.

Dated this 2 day of November, 1996,

Lloyd D. George
Chief United States District Judge

A11 (Filed 6/29/95)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Ray Watson,
Plaintiff,

v.

William Szczepaniak, et, al.,
Defendants.

CV-S-95-189-LDG (RJJ)

ORDER

Plaintiff Ray Watson, who is proceeding pro se, sues Defendants William Szczepaniak and Las Vegas Valley Water District pursuant to 42 U.S.C. § 1983 for violation of his civil rights. Watson's allegations arise from his termination as an employee of the Water district. Defendants move to dismiss (#3) the claims for failure to state a claim pursuant to Fed. R. Civ. Pro. 12(b)(6).

Pursuant to the allegations of his complaint, on January 19, 1993, received a "Notice of Intent to Terminate" from William Szczepaniak, apparently terminating Watson's employment as of January 22, 1993. As reasons for termination, Szczepaniak asserted Watson had driven with a suspended license and for a lack of trust arising from Watson's police record involving a 1989 "problem". A Post-termination hearing was held February 11, 1993. Sometime after February 11, the hearing officer continued Watsons' termination date to March 31, 1993, but left Watson on administrative leave. Szczepaniak added am "insurance benefits problem" as a further reason for Watsons' termination. Another post-termination hearing was held on May 13, 1993. On February 24, 1993, Watson brought this action alleging that his termination, and the May 13, 1993 post-termination hearing, deprived him of his civil rights, and violated procedural and substantive due process. Watson also alleges a state claim for breach of contract.

MOTION TO DISMISS

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In considering a motion to dismiss for failure to state a claim upon which relief can be granted, all material allegations in the complaint are accepted as true and are to be construed in a light most favorable to the non-moving party. *Russell v. Landrieu*, 621 F 2d 1037 (9th Cir. 1980). A dismissal under Fed. R. Civ. Pro. 12(b)(6) is essentially a ruling on a question of law. *North Star Int'l v. Arizona Corp. Comm'n*, 720 F 2d 578 (9th Cir. 1983). For a defendant-movant to succeed, it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proven under the allegations of the complaint. *Halet v. Wend Inv. C.*, 672 F 2d 1305 (9th Cir. 1983). Although allegations of a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers, *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam), sweeping conclusory allegations do not suffice. *Leer v. Murphy*, 844 F. 2d 628, 634 (9th cir. 1988).

Statue of Limitations

Watson generally titles his first cause of action as one for deprivation of civil rights. Defendants argue that the entire claim must be dismissed as barred by the statute of limitations. Title 42 U.S. C. § 1983 does not contain its own statute of limitations. Thus, federal courts apply the most suitable statute of limitations of the state in which the claim for 42 U.S.C. § 1983 claims. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). *Donoghue v. County of Orange*, 848 F 2d 926, 930 (9th Cir. 1987).

To identify the limitations period that the court must apply, the court characterizes § 1983 claims as personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). The court then looks to and applies the states' general or residual personal injury statute of limitations. *Owens v. Okure*, 488 U.S. 235, 251 (1989). In Nevada, the statute of limitations for personal injury actions is two years from the date the cause of action accrues. Nev. Rev. Stat. § 11.190(4)(e); *Perez v. Seevers*, 869 F. 2d 425, 426 (9th Cir.) *cert. denied*, 493 U.S. 860 (1989).

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Although the court must apply the states' limitations period, it must decide when a § 1983 claim accrues under law. *Bagely v. CMC Real Estate Corp.*, 923 F 2d 758, 760 (9th Cir. 1991), *cert. denied* 112 S.Ct. 1161(1992). Generally, claims accrue "when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Norco Const. V. King County*, 801 F 2d 1143, 1145 (9th Cir. 1986); Trotter v. International Longshoreman's' Union, Local 13, 704 F 2d 1141, 1143 (9the Cir. 1983). A plaintiff may recover only for the causes of action he has specifically alleged to have accrued within the appropriate limitations period. *Gibson v. United states*, 781 F 2d 1334, 1340 (9th Cir. 1986), *cert. denied* 479 U.S. 1054 (1987).

As to claims arising from employment, accrual generally occurs "at the time the [adverse employment] decision was made and communicated" to the employee. *Delaware State College v. Ricks*, 449 U.S.250, 258, 101 S. Ct. 498, 504, 66 L.Ed.2d 431 (1980). In *Chardon v. Fernandez*, the supreme court held that when determining the accrual date of a claim, " the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act becomes painful". 454 U.S. 6,8, 102 S.Ct. 28, 29, 70 L.Ed. 2d 6 (1981) (emphasis ion original) (citation omitted).

The supreme court has directed that to determine the event causing an action to accrue, a court must first identify precisely the unlawful conduct of which the plaintiff complains. *Ricks*, 449 U.S. at 257. In the present matter, Watson complaints fall into two general categories. (1) his first claim alleges that his termination violated his civil rights, including fundamental fairness, arbitrariness, equal protection, and cruel treatment and excessive punishment, and(2) his second and third claim allege that his termination and his May 13, 1993 post-termination hearing violated procedural and substantive due process. As to his termination, under *Ricks* and *Chardon*, any cause of action arising out of the decision to terminate him would accrue on the date Watson received notice of that decision, not on the date he felt the full impact of that employment decision. As Watson concedes in his complaint that he

received notice of his termination on January 19, 1993, any claims arising from that termination would have accrued on that date. Watsons' argument that his claims did not accrue until March 31, 1993, his last day of work, simply fails under *Ricks* and *Chardon*. Accordingly, Watsons' claims arising from his termination are barred by the statute of limitations. As to his claims related to his post-termination hearing arose from facts occurring after February 24, 1993, those claims are not barred by the statute of limitations.

Failure to State Constitutional Claim

Claims Arising from Termination.

In addition to being barred by the statue of limitations, Watsons' various complaints arising from his termination do not state a cognizable claim under 1983. Watson alleges that his termination violated his right to equal protection, fairness and was arbitrary. These allegations arise from the same argument; that he was terminated for conduct for which other employees were not terminated. He essentially concedes that he drove with a suspended license, that he had a "problem" with his police record, and that he had a "problem" with insurance benefits. He argues, however, that his termination was unfair, arbitrary and violated equal protection because other individuals suffering similar problems were not terminated.

To support a claim under the equal protection clause, a plaintiff must show intentional discrimination against him because of his membership in particular class, not merely that he was treated unfairly as an individual. The plaintiff must show that the defendants acted with a discriminatory purpose or intent. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977),. This discriminatory purpose or intent may be established by proof of the systemic exclusion of persons because of their membership in a the suspect class or the unequal application of a law, policy or system due to that membership. *Id*at 266-67. In his complaint, Watson fails to allege that Defendants acted toward him with a discriminatory purpose or intent because of his membership

in a particular class. While he alleges he was treated differently, he fails to ascribe a constitutionally improper purpose, that is, a discriminatory animus based upon Watsons' membership in a suspect class. Accordingly, this aspect of his first count fails to state any causes of action.

Watson also alleges that his termination constituted cruel treatment and excessive punishment. The constitutions' amendment prohibition against cruel and unusual punishments, however, does not extend to Watson. The Eight amendment prohibits the infliction of cruel and unusual punishment on those convicted of crimes and applies to the states through the due process clause of the fourteenth amendment. *Robinson v. California*, 370 U.S. 660, 666 (1972). As Watson complains of conduct relating to his termination his claim fails as a matter of law. Accordingly, even if Watsons' claims arising from his termination were not barred by the statue of limitations, they would nevertheless fail as they do not state cognizable constitutional claim.

Claims Arising From Post-Termination Hearing

Watson alleges that his post-termination hearing violated both procedure and substantive due process. As to substantive due process, Watson argues that he has alleged that the hearing officers' findings were not supported by evidence. The allegation of Watson's complaint, however, do not support this argument but contradicts it. Watson concedes that he had problems with his insurance benefits and with his police record, and that he drove with a suspended drivers' license. Accordingly, as evidence supporting the termination was presented to the hearing officer, Watson has failed to allege that his substantive due process rights were violated.

As to procedural due process, Watson does not allege that he failed to receive notice of the post-termination hearing, or that he lacked an opportunity to be heard at that hearing. He argues, however, that the hearing officer was not impartial and that he did not receive two letters from the city attorney, presumably addressed

to Szczepaniak. As to the partiality of the hearing officer, Watsons' allegations state, at most, that his employer named the hearing officer and that the hearing officer viewed the facts and made a decision adverse to him. These allegations do not rise to the level of impermissable bias. Watson has not shown that the hearing officer was involved in the investigation. That the hearing officer did not accept Watsons' view of the evidence does not show bias, but merely show that the hearing officer was persuaded by the arguments and evidence against Watson.

Watson also makes the conclusory allegation that Szczepaniak with held vital evidence from Watson, namely two letters from the city attorney. Significantly, however, Watson fails to allege facts suggesting how the letters were vital, or to allege facts indicating that Watson had a due process to the letter themselves. The essential elements of procedure due process are notice and an opportunity to respond. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). Thus, Watson had a right to notice of the evidence to be used against him and an opportunity to respond and rebuts that evidence at the hearing. In the instant matter, Watson does not allege that the letters were either relied upon or presented to the hearing officer. Neither does Watson allege facts suggesting that the procedure governing the post-termination hearing required that the letters be given to him even though they were not used against him at the hearing. Accordingly, Watson's conclusory allegation that vital evidence was withheld from him does not state a violation.

Finally, "[a] pro se litigant must be given leave to amend his or her complaint unless it is absolute clear that the deficiencies of the complaint could not be cured by amendment".

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1. Watson does not allege that these letters were addressed to him. *Noll v. Carlson*, 809 F 2d 1446 (9th Cir. 1987).

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Watsons' complaint makes absolutely clear that he cannot amend to cure the statue of limitations bar or to state a claim based upon substantive due process. Watsons' complaint concedes facts showing that he was notified of his termination more than two years prior to bringing this action. His complaint also concedes facts showing that the hearing officer had substantial evidence upon which to base his decision. As to procedural due process, however, it is not absolutely clear that Watson cannot allege facts showing a due process right to the two letters prior to the hearing. The court notes that, in filing an amended complaint, plaintiff must correct this noted deficiencies, if he can. As the amended complaint will supercede the original complaint, the amended complaint must be complete in itself, that is, it may not refer to the original complaint. Accordingly,

IT IS **ORDERED** that the defendants motion to dismiss (#3) is GRANTED as follows: that portion of plaintiffs' second claim arising from the alleged withholding of two letters is DISMISSED without prejudice. Plaintiff shall have thirty days to file an amended complaint correcting the above noted deficiencies. The court will dismiss this claim with prejudice if plaintiff fail to timely amend this complaint. The remainder of plaintiffs' second claim and the entirety of his First and Third claims are DISMISSED with prejudice.

Dated this 29 day of June 1995.

/s/_____

Lloyd D. George

Chief United States District Judge

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Filed January 16, 1998)

Ray Watson, Plaintiff-Appellant, v.	No. 96-17290 D.C. No. CV-95-0018-LDG/RJJU
William Szczepaniak; Las Vegas Valley Water District.	**ORDER**

Before: HALL, BRUNETTI AND THOMAS, Circuit Judges.

The panel has voted to deny appellants' petition for rehearing. Judges Brunetti and Thomas have voted to reject the suggestion for rehearing en banc. and Judge Hall so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

A19 (Filed 1/29/98)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ray Watson, Plaintiff-Appellant, v. William Szczepaniak; Las Vegas Valley Water District	No. 96-17290 CT/AG#: CV-95-00189-LDG/RJJU

APPEAL FROM the United states District court for the District of Nevada (Las Vegas). THIS CAUSE came to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Las Vegas) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this court, that the judgment of the said district Court in this cause be, and hereby AFFIRMED.

Filed and entered September 12, 1997

A20 (Filed 11/7/96)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Ray Watson, Plaintiff, v. William Szczepaniak, et al., Defendants.	CV-S-95-0189-LDG/RJJ) **JUDGMENT**

Pursuant to this courts' order

IT IS THEREFORE **ORDERED** that judgment is ENTERED in favor of Defendants and against plaintiff as to plaintiff's second cause of action.

IT IS FUTHER **ORDERED** that plaintiffs' third cause of action, a pendant state claim, is DISMISSED WITHOUT PREJUDICE.

Dated this 2 day of November, 1996.

/s/ _____
LLOYD D. GEORGE
Chief United States District Judge

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Ray Watson,
608 Marcella
North Las Vegas, Nevada 89030
(702) 642-5702
Pro Per

Filed 2/24/95

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Ray Watson	CV-S-95-0189-LDG/RJJ
Plaintiff,	**COMPLAINT** (Jury Demanded)
Vs.	
WILLIAM SZCZEPANAIK, LAS VEGAS VALLEY WATER DISTRICT	
Defendant	

53.

(d) That defendant William Szczepaniak and Hearing Officer David Donnelly, with willful and wanton disregard for plaintiffs' substantive rights, refused to offer written legal justification, blatantly stating,

"This was an oral opinion, no written opinion was provided or will be provided."

54.

That refusal to offer written proof of oral opinion violates plaintiffs' opportunity to challenge and rebut defendant William Szczepanaik 's claim of just cause for discharge.

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55.

That defendant William Szczepaniak withheld vital evidence, two letters of communication, from the City Attorney. That plaintiff had no knowledge or opportunity to challenge this information.

56.

That on March 31, 1993 defendant William Szczepaniak removed plaintiff from the Water district payroll.

(Filed 5/21/96)

Las Vegas Valley Water District **PROCEDURE**	**Due Process Rights For Management, Supervisory and Confidential employees**	Number 110 Issue 1
Issuing Dept. Personnel	Approved by: /s/ Patricia Mulroy 9/20/84	Page 1 of 7

PURPOSE

To establish due process rights for other than probationary employees regulated by the Management work rules in the event of a termination from employment.

1. No employee who has satisfactorily completed probation may be terminated without just cause. Just cause may include, but is not limited to, inefficiency, incompetence, insubordination, moral misconduct, mental or physical disability as shown by competent medical evidence, habitual tardiness or absenteeism, abuse or excessive use of sick leave, or authorized leaves, withholding services or violation of promulgated District rules or procedures.

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An eligible employee who is to be terminated shall be given a written statement setting forth the reasons for the proposed termination. Upon written request, the employee shall be provided with the opportunity of an informal pretermination hearing to respond to the charges prior to being permanently removed from the payroll. The employee may be suspended pending the pretermination hearing with or without pay.

Initiation of the Pretermination Hearing Process.

The employee shall have two(2) working days, not including the day of receipt of notice recommending termination of employment to request in writing, of the department head, a pretermination hearing. The hearing will be before the supervisor initiating the action or the supervisors' designee. A copy if the request will be also sent to the Personnel Director.

The Hearing

The employee who has made a timely written request for a pretermination hearing will be notified of the time and location of the pretermination hearing at least three (3) working days prior to the hearing. Failure on the part of the employee to make a request in writing or to appear at the scheduled pretermination hearing will serve as a waiver of the procedure. The hearing will be conducted in an informal manner, formal rules of evidence will not apply. The hearing may be taped with both parties receiving copies. The employee must respond to all specified charges and will be provided the opportunity to offer rebuttal to those charges.
The appropriate supervisor or the supervisors' designee will forward to the employee a written decision within fort-eight (48) hours of the close of the pretermination hearing.

Post-termination Appeal on the Record

1. Within ten (10) working days after the decision for termination of employment, the employee who has been dismissed

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may request in writing, a hearing before the General Manager to determine the reasonableness of the action.

2. The General Manager or the General Managers' designee shall grant the employee a hearing, on the record, within twenty (20) working days after the receipt of the employees' written request.

3. Formal rules of evidence do not apply at the hearing.

4. Within 10 days after the hearing, and after review and consideration of the record and evidence, the general manager or the General Managers' designee shall render a written decision.

5. At the conclusion of a hearing, the General Manager may decide:

A. That the action appealed was without justification and that the appellant be restored to his/her previous status and receive compensation for the period of any suspension, termination or reduction in grade; or,

B. That the action appealed was justified and should be Confirmed; or,

C. That such other action as the General Manager deems Proper should be taken.

6. The decision of the General Manager or the General Managers' designee is final and binding on the parties.

A26
Filed 5/21/96
Management Work Rules

4.6.1

Employees, other than the General Manager, Deputy General Manager, and Department Heads, May be removed by their respective department heads, but may appeal such removal to the General Manager. The Decision of the General manager will be final.

4.6.2.

Probationary employees serve at the pleasure of the department head. Employees may be discharged immediately by their respective department heads.

4.6.3.

The Deputy General Manager, Department Heads , including the Chief Engineer, serve at the pleasure of the General Manager and may be discharged, for a stated cause reflecting to work performance or personal conduct affecting District operations, immediately by the General Manager. When immediate discharge is not deemed appropriate, written notice of discharge shall be given at least thirty days (30) days in advance of discharge. All such action shall be stated in writing.

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Filed 5/21/96

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Attorneys for Defendant
William Szczepaniuak

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Ray Watson, Plaintiff, v. William Szczepaniak, David Donnelly, Las Vegas Valley Water District, Defendants.	Case no. CV-S-95-0189-LDG(RJJ) Defendants' Answers to Plaintiffs' Interrogatories for William Szczepaniak

---

To: Ray Watson, Plaintiff Pro Per.

Defendant William Szczepaniak responds to plaintiffs' interrogatories for William Szzczepaniak as follows:

Interrogatory #1

State your name and job position with the Las Vegas Valley Water District (herin after referred to as "District")

Answer to Interrogatory #1

William Szczepaniak. Security Systems Supervisor.

Interrogatory #2

Was plaintiff Ray Watson re-instated on February 25, 1993 by hearing Officer Richard Wimmer. And if your answer is in the affirmative,

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(Filed 5/26/96)

TIMELINE OF EVENTS

Date	Occurrence	Other
1/19/93	Notice of intent to terminate *(harm)*	
1/22/93	Petitioner terminated by Supervisor Szczepaniak	
2/ 11/93	Post-termination hearing held by hearing Officer Richard Wimmer	
2/25/93	Post-termination decision petitioner Re-instated[13]	
3/ 4 /93	**Notice of Intent to Terminate by Szczepaniak (petitioner *"harmed"* on March 4, 1993)**	
3/31/93	Petitioner terminated by supervisor Szczepaniak	
5/13/93	Post-termination Hearing by David Donnelly	
6/11/93	Donnelly decision letter – New evidence used against petitioner to deprive him of property.	
2/ 24/95	Petitioner filed original complaint	
6/ 29/95	District Court Order (#8) *"claims after 225/ 93 are not barred"*	
7/25/95	Petitioner amended complaint #1. David Donnelly named as defendant (FRCP 15(c))	
1/ 5/96	District court denied Petitioner's protective order	

[13] *Reinstatement restored all petitioners' property rights, privileges, immunities and due process rights as guaranteed by the 14th Amendment. The action of the respondents, by conducting subsequent pre and post-termination hearings, confirm their recognition of petitioner's restored property rights.*

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1/5/96	Petitioner telephoned defendant counsel to postpone deposition date of January 9, 1993
1/8/96	District court issued Scheduling order for discovery February 8, 1996 Petitioner filed amended complaint #2
2/22/96	Petitioner attended his deposition
3/25/96	District court finally ruled on Petitioner's complaint and rendered final judgment on entire case.

A30 (Par. 1)

The CJRA required all 94 federal districts to implement "*civil justice expense and delay reduction plans" that would "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes" (28 USC § 471*

(Par 2.)

A writ of mandamus *is* necessary" *to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so".*
Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943).
Petitioner request this court exercise its supervisory powers to correct departures from accepted and usual course of judicial procedures, and restore petitioner's constitutional right to fair process in light of Will v. United States, 389 US at 95, 88 S. Ct at 273, quoting Roche Evaporated Milk Assn., 319 US 21, 26, 63 S. Ct. 938, 941, 87L LEd. 1185 ?

(From page 3, question 7)

Petitioner was re-instated to employment by the appellees on February 24, 1993. As a public employee, he was entitled to all rights, privileges and immunities as provided by the work rules; the 14th Amendment notwithstanding. (see Sweikert v. Briare, 588 P 2d. 542, 544(Nev. 1978). The respondents gave notice of intent to terminate on *(harmed pursuant to Ricks)* and his supervisor William Szczepaniak terminated petitioner on March 31, 1993. Petitioner was given a post-termination hearing on May 13, 1993 by David Donnelly. All of these events occurred after February 24, 1993 and were not barred by the statute of limitations.